

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
All American Telephone Company, Inc. Tariff) WCB/Pricing File No. 10-07
F.C.C. No. 3) Transmittal No. 4

ORDER

Adopted: May 21, 2010

Released: May 21, 2010

By the Chief, Pricing Policy Division:

I. INTRODUCTION

1. On May 7, 2010, All American Telephone Company, Inc. (All American) filed Tariff F.C.C. No. 3, to replace All American Tariff F.C.C. Nos. 1 and 2 for "Regulations, Rates and Charges Applying to the Provision of Access Service for Connection to Interstate Communications Facilities and Services." The proposed tariff is scheduled to become effective on May 24, 2010. Because the tariff does not specify the charges for the services it provides, we reject Transmittal No. 4 as patently unlawful, in violation of sections 61.2 and 61.25 of the Commission's rules and section 203 of the Communications Act.

II. BACKGROUND

2. All American filed the above-referenced tariff on May 7, 2010 to become effective on May 24, 2010. Section 7 of the tariff lists applicable rate elements and states that "[t]he Company's rates for recurring services are set at or below the rates for equivalent services" offered by Beehive Telephone Companies. The tariff then cross references the rates of Beehive Telephone Companies in National Exchange Carrier Association (NECA) Tariff F.C.C. No. 5, Section 17.

3. On May 14, 2010, Sprint Communications Company, L.P. (Sprint); Qwest Communications Company, LLC (Qwest); and AT&T Corp. (AT&T) (together, the "Petitioners") filed

1 Letter from Katherine E. Barker Marshall, Counsel to All American Telephone Company, to Marlene H. Dortch, Secretary, Federal Communications Commission, Transmittal No. 4 (filed May 7, 2010).

2 47 C.F.R. § 61.2 ("all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations"), § 61.25 (requiring the carrier to "specifically identify the rates being cross-referenced so as to leave no doubt as to the exact rates that will apply . . ."); 47 U.S.C. §203(a) (requiring common carriers to file "schedules showing all charges").

3 All American Tariff F.C.C. No. 3, Sections 7.2.1. (a)-(g), 7.2.2. The rate elements listed are Local Switching, per MOU, Tandem Switching, per MOU, Tandem-Switched Facility, per MOU/mile, Tandem Switched Termination, per MOU, Presubscribed Interexchange Carrier Charge (if applicable), Transport Interconnection Charge (if applicable), and Information Surcharge (if applicable).

4 Id. at Section 7.2.2.

petitions to reject, or in the alternative, to suspend and investigate the All American tariff filing.⁵ The Petitioners contend that the All American tariff is unlawful for a number of reasons, including that it fails to properly specify a rate that would apply to the services provided. On May 20, 2010, All American filed a reply responding to many of the Petitioners' arguments, but failed to adequately address the argument that its tariff does not specify a rate, simply noting that its rate provisions are similar to other CLEC tariffs.⁶

III. DISCUSSION

4. The Commission may reject a tariff filed by a carrier if the filing is "so patently a nullity as a matter of substantive law, that administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket."⁷ The United States Court of Appeals for the District of Columbia Circuit has explained that the Commission has "the power and in some cases the duty" to reject a tariff that is demonstrably unlawful on its face, or that conflicts with a statute, agency regulation or order.⁸ Under this standard, we reject Transmittal No. 4 because the tariff revisions violate the Commission's rules requiring tariffs to clearly establish a rate.

5. Section 61.2 of the Commission's rules requires that tariffs "contain clear and explicit explanatory statements regarding the rates and regulations."⁹ Although the Commission does permit nondominant carriers to cross-reference the rate provisions of another carrier's interstate tariff, section 61.25 of the Commission's rules, consistent with section 203 of the Act, requires the carrier to "specifically identify in its tariff the rates being cross-referenced so as to leave no doubt as to the exact rates that will apply."¹⁰ In this instance, section 7.2.2 of All American's tariff cross references Beehive Telephone Companies' rates in NECA Tariff F.C.C. No. 5, Section 17 and states that the "rates for recurring services are set at or below the rates for equivalent services tariffed by the following Incumbent Local Exchange Carriers."¹¹ This range of rates provision does not provide the exact rates that will be charged and therefore is in violation of sections 61.2 and 61.25 of the Commission's rules.¹² And the

⁵ See Petition of Sprint Communications Company, L.P. to Reject or in the Alternative Suspend and Investigate, All American Tariff F.C.C. No. 3, Transmittal No. 4 (filed May 14, 2010); Petition of Qwest Communications Company, LLC to Reject or, in the Alternative, Suspend and Investigate, All American Tariff F.C.C. No. 3, Transmittal No. 4 (filed May 14, 2010); Petition of AT&T Corp. to Reject or in the Alternative to Suspend and Investigate All American's Tariff F.C.C. No. 3, All American Tariff F.C.C. No. 3, Transmittal No. 4 (filed May 14, 2010).

⁶ Reply of All American Telephone Company, Inc. to Petition to Reject, or, in the Alternative, to Suspend and Investigate All American's Tariff No. 3 Filed by AT&T Corp., Qwest Communications Company LLC and Sprint Communications Company, L.P., All American Tariff F.C.C. No. 3, Transmittal No. 4 (filed May 20, 2010) (All American Reply).

⁷ *Municipal Light Bds. v. FPC*, 450 F.2d 1341, 1346 (D.C. Cir. 1971); *cert denied*, 405 U.S. 989 (1972); *see also Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994); *American Broadcasting Cos. v. FCC*, 663 F.2d 133, 138 (D.C. Cir. 1980).

⁸ *Associated Press v. FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971).

⁹ 47 C.F.R. § 61.2.

¹⁰ 47 C.F.R. § 61.25.

¹¹ All American Tariff F.C.C. No. 3, Section 7.2.2.

¹² 47 C.F.R. §§ 61.2, 61.25. We reject All American's argument that because other CLEC tariffs contain a similar rate structure, the All American tariff rate provision is sufficient. *See All American Reply* at 13. The fact that other tariffs that were never challenged contain a similar provision has no bearing on whether All American's tariff rate provisions are consistent with our rules. Moreover, we note that the cross reference is also ambiguous, as Section 17 of NECA Tariff F.C.C. No. 5 contains over 300 pages of rates.

D.C. Circuit has expressly held that tariffs providing a range of rates violate section 203(a) of the Act because the rate is not explicitly defined.¹³ Accordingly, the tariff revisions as filed are unlawful.¹⁴

IV. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 4(i), 4(j), and 203(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 154(j), and 203(a), and sections 61.2 and 61.25 of the Commission's rules, 47 C.F.R. §§ 61.2, 61.25, and authority delegated by sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, that the revisions to All American Telephone Company Tariff F.C.C. No. 3 contained in Transmittal No. 4 ARE HEREBY REJECTED;

7. IT IS FURTHER ORDERED that, pursuant to section 61.69 of the Commission's rules, 47 C.F.R. § 61.69, All American SHALL FILE tariff revisions on one day's notice within five business days from the release date of this order removing the rejected material.

FEDERAL COMMUNICATIONS COMMISSION

Albert M. Lewis
Chief, Pricing Policy Division
Wireline Competition Bureau

¹³ *Southwestern Bell Corporation, et. al. v. Federal Communications Commission*, 43 F.3d 1515, 1520 (D.C. Cir. 1995) ("section 203(a)'s mandate that every common carrier file 'schedules showing all charges' does not permit the FCC to allow some common carriers to file a range of charges") (emphasis in original).

¹⁴ Because we reject these tariff revisions based on the unlawfulness of the fundamental rate provisions, we need not and do not decide any of the other issues raised by the Petitioners in opposition to this tariff. Should All American decide to refile this or a similar tariff, we encourage it to work with its intended carrier-customers to resolve their concerns before filing a new tariff. In particular, All American should address how it will provide service in the Beehive territory in Utah after the Utah Public Service Commission ordered it to cease operating in the state. See AT&T Petition, Exhibit A, p. 35.